For these reasons, we would allow the appeal with costs here and below. The judgment below is set aside and we give judgment for the appellants in the sum of $161,500 together with interest thereon at 10% per annum calculated from January 1, 1977 up to date hereof.

Appeal allowed.

Solicitors: *Michael B.B. Ong & Co.; Chan, Goh & Co.*

ART TREND LTD. v. BLUE DOLPHIN (PTE.) LTD. & ORS.

**[C.A. (Wee Chong Jin C.J., Chua & Rajah JJ.)
May 4, 1983]
[Singapore – Civil Appeal No. 38 of 1982]**

Practice & Procedure – Interim Mareva injunctions – Hardship to defendants – Removal of injunctions allowed by High Court and damages awarded to defendants – Appeal against decision of High Court.

The appellants in this case claimed against the respondents the total sum of US$728,468.65 under bills of exchange drawn by the appellants and accepted by the respondents, and return guarantees given by both respondents in favour of the appellants. The appellants obtained interim *Mareva* injunction against the respondents which sought to freeze the assets of the respondents to US$1.23 million. In effect, the respondents were restrained from removing from Singapore any of their assets or otherwise pledging them or giving them by way of security. The respondents were also restrained from re-directing any payments made or to be made by their debtors from the accounts with their several banks. The business operations of the respondents were brought to a grinding halt. The learned trial judge considered the conduct of the appellants reprehensible and discharged the injunctions. Damages against the appellants were ordered (see [1983] 1 M.L.J. 25]. The appellants appealed.

Held, dismissing the appeal: the interim injunction in this case was a *Mareva* injunction. It was not a case where the final remedy sought was for a permanent injunction. The appellants did not dispute the respondents' right to an inquiry as to damages as indeed they could not having regard to the terms of their undertaking to the court of May 6, 1982 and May 21, 1982. In these circumstances the learned judge was entitled to make the order for immediate assessment and payment of any damages sustained by the respondents by reason of the *Mareva* injunction.

Case referred to:

(1) *Ushers Brewery* v. *King & Co.* [1972] 1 Ch. 148

COURT OF APPEAL.

M. Beloff Q.C. (*Yang Lih Shyng* with him) for the appellants.

M. Karthigesu (*Abdul Rashid bin Abdul Gani* with him) for the respondents.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the Judgement of the Court): On May 5, 1982 the appellants, an English company, commenced an action against the respondents. The claim against the 1st respondent, a Singapore company, was for (1) the sum of US$33,943.05 under a bill of exchange due on July 17, 1981 drawn by the plaintiffs and accepted by the 1st respondent plus interest and commission under a discounting and financing agreement entered into between them and dated February 12, 1980; and (2) the sum of US$326,202.17 under a written guarantee dated November 11, 1981 given by the first respondent in favour of the plaintiffs and in which the first respondent had guaranteed the payment of all the liabilities of a Nigerian company known as Ojomo Industries (Nigeria) Limited (hereinafter referred to as "Ojomo") plus interest at the date of the writ amounting to US$128,394.23 and further interest and commission payable under the guarantee.

The claim against the 2nd respondent, a partnership firm of three brothers dealing in textiles, in real estate and electronic goods, was for (1) the sum of US$182,407.93 under a bill of exchange due on May 6, 1981 drawn by the plaintiffs and accepted by the 2nd respondent plus interest as at the date of the Writ amounting to US$56,521.27 and further interest and commission payable under a discounting and financing agreement entered into between them and also date February 12, 1980; and (2) the sum of US$326,202.17 under a written guarantee dated April 21, 1980 given by the 2nd respondent in favour of the plaintiffs and in which the 2nd respondent had guaranteed payment of all the liabilities of the 1st respondent plus interest as at the date of the Writ amounting to US$128,394.23 and further interest and commission.

On May 6, 1982 the appellants obtained, *ex parte*, an interim *Mareva* injunction against both respondents which in effect restrained them from removing from Singapore or otherwise disposing, whether within or without the jurisdiction, of any of their assets (including immovable properties and moneys in bank accounts) in which they (including the partners of the 2nd respondent) were beneficially interested, or otherwise pledging them or giving them by way of security. The respondents were also restrained from re-directing any

payments made or to be made by their debtors from the accounts with their several banks. Paragraph 3 of the injunction stated as follows:—

"The Defendants shall not be prevented from dealing in any way with their assets in so far as the assets of the Defendants available to meet the Plaintiffs' claim herein exceed in aggregate the sum of US$1,230,000/-."

At least twelve banks were served with the injunction order of May 6, 1982 as a result of which the business operations of the respondents were completely halted. The proviso exempting dealings in any way with the respondents' assets as contained in the said paragraph 3 of the injunction order was of no assistance to the respondents. Unless each of the respondents had assets in a bank which exceeded US$1.23 million, the banks served with the order would not allow any further transactions in the accounts of both respondents. It would also appear that as the effective total claims against both respondents were for US$728,468.65 plus further interest and commission the freezing of US$1.23 million worth of assets of the respondents was plainly unjustifiable.

The 2nd respondents through their solicitors protested vigorously against the interim injunction. By a letter May 10, 1982 they pointed out that the total claims were for US$740,261.53 whereas their assets had been frozen up to US$1.23 million. They also pointed out that they were an old established Singapore firm which enjoyed a very good reputation with their bankers who have been granting them large banking facilities without any security and that the injunction had brought their daily business operations to a grinding halt and had caused irreparable damage to their reputation. It was also pointed out that the injunction specifically named two properties, No. 75 High Street, Singapore and No. 9 Lyndhurst Road, Singapore, one of which was worth S$6 to 6.5 million and the other S$800,000/-. The appellants were requested to inform the banks served with the order that they would not seek to enforce the order over the bank accounts.

The appellants through their solicitors refused to release the banks and asserted that their claim in aggregate against both respondents was for US$1.23 million and it was only on May 21, 1982 on a motion to continue the injunction granted on May 6, 1982 that they agreed to a variation of that injunction. The variation is contained in a consent Order of Court dated May 21, 1982, the material provisions of which read as follows:—

"It is ordered by consent and directed that without prejudice to the 1st and 2nd Defendants' right to apply to discharge the injunction granted on the 6th day of May 1982 and the Order made herein on a date to be fixed by the Registrar:

1. An injunction granted herein on the 6th day of May 1982 restraining the 1st Defendants (whether by their Directors or their servants or agents or any of them or otherwise whatsoever) be and hereby continued until further order ...."

Three days later, on May 24, 1982, the respondents' application to discharge the injunctions granted on May 6, 1982 and May 21, 1982 was heard by Lai Kew Chai, J. who after hearing counsel for the parties discharged the injunctions and ordered damages to be assessed by the Registrar. The appellants now appeal against the decision of Lai Kew Chai, J.

At the hearing of the appeal, the court was informed that in an Order 14 application heard by the Registrar the previous day, the respondents were given leave to defend the action on condition that the sum of US$700,000 be paid into court or a banker's guarantee be provided within fourteen days from the date of the Registrar's order.

One of the contentions raised by the appellants is that the consent order of May 21, 1982 was made in consideration of the 2nd respondents undertaking as set out in the said order of court as follows:—

"They have not whether before or since the Order of Court herein dated the 6th day of May 1982 sold, charged, pledged, offered or given as security or disposed of by any means whatsoever whether within or without the jurisdiction of any part of their interests in the property known as No. 75 High Street, Singapore (save for the mortgage to Tan Jin Chwee & Co. Ltd. for S$100,000/-) AND UPON the 2nd Defendants further undertaking to this Honourable Court that they will not except with the Plaintiffs' prior consent in writing (which consent the Plaintiffs agree will not be unreasonably withheld) or pursuant to Order of this Honourable Court sell, charge, pledge, offer or given as security or dispose of by any means whatsoever, whether within or without the jurisdiction, any part of their interests in the property known as No. 75 High Street, Singapore (save for the mortgage to Tan Jin Chwee & Co; Ltd. for S$100,000/-)."

It is submitted that the respondents were contractually bound by their undertakings as embodied in the said order of court which, though it expressly reserved to the respondents the right to apply for discharge of the injunctions granted by the orders of court of May 6, 1982 and May 21, 1982 did not expressly reserve any right to apply

to the court to release the respondents from their undertakings. The submission is that, accordingly, the discharge of the injunctions by Lai Kew Chai, J. did not or could not discharge the respondents from their undertakings which were contractual obligations unless there were grounds to set them aside as a contract. We cannot accept that submission. If the decision of Lai Kew Chai, J. is correct, the *Mareva* injunction granted on May 6, 1982 should not have been granted and could not have been continued, even as varied, by the order of court of May 21, 1982. In any event, in our judgment, assuming that the undertakings are contractual in nature, it must be an implied term of the contract that if the injunctions are subsequently discharged after the merits of the application for a *Mareva* injunction had been decided by a court, that any order made by the court would displace the earlier consent order of court of May 21, 1982. It is also, in our opinion, plain, as the parties negotiated and agreed to the consent order on the basis that it was to be an interim order binding "until further order" that the undertakings would lapse in the event of the discharge of the *Mareva* injunction.

The substantive issue in this appeal is whether the decision of Lai Kew Chai, J. in discharging the *Mareva* injunction either in the from granted by the order of court of May 6, 1982 or in the form granted by the order of court of May 21, 1982 was a wrongful and/or unlawful exercise of his discretion. The appellants contend that Lai Kew Chai, J. was wrong in his application of principle to the facts in his assessment of the risk of the respondents removing their assets from the jurisdiction and so stultifying any judgment given by the court in the action. It is submitted that on the facts before him Lai Kew Chai, J. ought to have come to the conclusion that there was a real risk of the assets being removed out of the jurisdiction.

It is said that Lai Kew Chai, J. ought to have inferred that there was a real risk of the respondents transferring their assets our of the jurisdiction because (1) the evidence before him showed that the respondents were in considerable financial trouble and there was no light at the end of the tunnel; (2) the respondents' failure to pay the appellants coupled with the delay and lack of candour on their part; (3) the respondents' conduct raises great suspicion; (4) the respondents at no time have been prepared to say they will meet any judgment and (5) the evidence of express intention to take out assets.

With regard to (5) the appellants sought leave to adduce fresh evidence in the form of an affidavit by a director directed to show that the partners of the 2nd respondent had in the recent past demonstrated their serious intention of transferring their most invaluable single asset, No. 75 High Street, Singapore and that that asset can easily be transferred to any company or party outside the jurisdiction. We do not think, even if the affidavit was before Lai Kew Chai, J. that it would have affected his decision and in our judgment, on the evidence before him Lai Kew Chai, J. was entitled to exercise his discretion in favour of discharging the *Mareva* injunction.

The final contention is that as there was no application before him, the judge was wrong in taking action on his own initiative to make an error for immediate assessment and payment thereafter of damages. It is said that it is contrary to general principles to make such an order at that stage of the action and that the proper time was at the conclusion of the trial of the action by the trial judge when all the evidence was before the trial judge. The appellants relied on the judgement of Plowman, J. in *Ushers Brewery* v. *King & Co.*[1].

We cannot extract from that judgment any general principle applicable to all cases where a court grants an interim injunction, *ex parte* on the applicant's undertaking as to damages. The interim injunction in the present case is a *Mareva* injunction. It is not a case where the final remedy sought is for a permanent injunction. The appellants do not dispute the respondents' right to an inquiry as to damages as indeed they could not having regard to the terms of their undertaking to the court as contained in the orders of court of May 6, 1982 and May 21, 1982. In these circumstances Lai Kew Chai, J. was entitled to make the order for immediate assessment and payment of any damages sustained by the respondents by reason of the *Mareva* injuncton.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Rodyk & Davidson; Khattar, Wong & Partners.*